No. 14692.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

NATIONAL WHOLESALERS, a Corporation; M-D PARTS MANUFACTURING COMPANY, NATIONAL PARTS COMPANY and HENRY MEZORI,

Appellees.

Notice of Motion to Dismiss Appeal and Motion to Dismiss Appeal With Points and Authorities.

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TABLE OF AUTHORITIES CITED

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Appellees.

NOTICE OF MOTION TO DISMISS APPEAL.

To the Appellant Above Named and to Its Attorneys, Laughlin E. Waters, United States Attorney, and to Max F. Deutz and Andrew J. Weisz, Assistants United States Attorney, and to Paul W. O'Brien, the Clerk of This Court:

You, and each of you, will please take notice that the appellees will be and appear before The Honorable, The United States Court of Appeals for the Ninth Circuit, at the United States Post Office and Court House Building, San Francisco, California, at 10:00 o'clock A. M., on Monday, June 27, 1955, and then and there move the Court to dismiss this appeal. The motion to dismiss follows.

Dated: June 16, 1955.

WM. H. NEBLETT,

Attorney for Appellees.

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Appellees.

MOTION TO DISMISS APPEAL.

Come now the appellees and move the Court to dismiss the appeal herein.

THE GROUNDS OF THE MOTION ARE:

(1) This Court is without jurisdiction to hear and determine this appeal;

(2) The appellant, United States of America, was not aggrieved by the decision of the District Court and cannot maintain this appeal;

(3) The decision of the duly authorized contracting officer for Army Ordnance, finding that the 6600 voltage regulators furnished by appellees to appellant complied

with the contract, cannot be attacked by appellant in the courts. The appellant is bound by its own decision, which became final October 16, 1950, nearly three years before the complaint was filed in the District Court, July 3, 1953; and,

(4) There is no merit in the appeal.

The Motion is made upon the printed transcript of the record, filed herein, and upon the points and authorities following this motion.

The opinion of the District Court for the Southern District of California, Central Division, directing a judgment of dismissal of the plaintiff's complaint is reported: 126 Fed. Supp. 357 (Dec. 1, 1954).

Dated: June 16, 1955.

WM. H. NEBLETT,
Attorney for Appellees.

Points and Authorities.

I.

The decision [Dept. Ex. A, Tr. 115-118], dated October 16, 1950, of the contracting officer for Army Ordnance, the duly delegated representative of the Secretary of the Army, was final as to the Government when made.

Public Contracts Law of 1948, as amended, 41 U. S. C. Secs. 156 and 257.

II.

The correctness of the determination by the Secretary or his authorized representative is not open to judicial review.

U. S. v. Binghampton Construction Co., 347 U. S. 171, 177, 74 S. Ct. 438, 441 (1954, citing Public Contracts Law, 41 U. S. C. Sec. 35 *et seq.*);

Wann v. Ickes, Secretary of the Interior (C. A. D. C.), 92 F. 2d 215, 217 (1937);

Standard Oil Co. of California v. United States (C. A. 9), 107 F. 2d 402, 422 (1940);

Estes v. Timmons, 199 U. S. 391, 26 S. Ct. 85, 86 (1905);

Whitcomb v. White, 214 U. S. 15, 29 S. Ct. 599, 600 (1909);

De Cambra v. Rogers, 189 U. S. 119, 23 S. Ct. 519, 520-521 (1903).

III.

The United States cannot question administratively or judicially the decision of the head of an executive department or his delegated representative whom he has authorized to make the decision.

United States v. Bucher (C. A. 8), 15 F. 2d 783, 786 (1926);

National Labor Relations Board v. Air Associates, (C. A. 2), 121 F. 2d 586, 590 (1941);

United Foundation Corp. v. United States (Ct. Cl.), 127 F. Supp. 798 (1955);

Johnson Contracting Corp. v. United States (Ct. Cl.), 119 F. Supp. 788, 792 (1954);

Brown & Root v. United States (Ct. Cl.), 116 F. Supp. 732, 739 (1953).

IV.

The final decision of the contracting officer [Deft. Ex. A, Tr. 115-118] involved the exercise of his discretion and is not subject to review by the judicial branch of the Government.

Friend v. Lee, Adm'r, Civil Aeronautics Administration (C. A. D. C.), 221 F. 2d 96, 100 (1955).

V.

The contract for the 6600 voltage regulators, No. DA-20-018-ORD-3951, dated April 1, 1950, is not in the printed transcript. The contract contained [Tr. 41, Par. 14] the standard dispute clause prescribed by The Congress (41 U. S. C., *Appendix, Sections* 54.1 and 54.13,

Article 15). The settlement of a dispute by the Secretary or his authorized representative under such a dispute clause cannot be attacked by the Government without pleading and proving fraud on the part of the officer making the decision. The complaint alleged no fraud on the part of the contracting officer. His authority was conceded by the Government.

United States v. Moorman, 338 U. S. 457, 70 S. Ct. 288 (1950);

United States v. Wunderlich, 342 U. S. 98, 100, 72 S. Ct. 154, 155 (1951);

Sunroc Refrigeration Co. v. United States (D. C. E. D. Penn.), 104 F. Supp. 131 (1952).

VI.

The provisions of the *Act of May 11, 1954* (41 U. S. C. Secs. 321-322) are solely for the benefit of the contractor. The Act gives the contractor the right to certain relief in the courts not formerly enjoyed by him; The Act leaves the Government in the exact position, with relation to administrative decisions made by executive departments, the Government occupied before the passage of the Act. The Government is still bound by its own final decisions and cannot reopen them administratively or judicially, unless fraud on the part of the officer making a decision is pleaded and proved.

House Report, No. 1380, March 22, 1954, *United States Code, Congressional and Administrative News, Volume* 2, pp. 2191-2197.

VII.

A party may not appeal from a judgment unless he has been aggrieved by it. A party is not aggrieved by a judgment when it is apparent on the face of the record that he has no standing to prosecute the appeal. The Government's appeal here amounts to nothing more than an attack upon a final decision made by one of its executive departments, the only body authorized by The Congress to make the decision. The rule is the same as if the Government had prosecuted this suit in the District Court to set aside a final judgment of a court, having jurisdiction of the parties and of the controversy, and after decision there, upholding the former judgment, to try to relitigate the things decided by the former final judgment in the Court of Appeals.

Public Contracts Law of 1948 as amended, Secs. 156 and 257;

United States v. Adamant Co. (C. A. 9), 197 F. 2d 1, 5 (1952);

In re Michigan-Ohio Bldg. Corp. (C. A. 7), 117 F. 2d 191, 193 (1941);

Clackamas County, Ore. v. Mackay, Sec. of the Interior (C. A. D. C.), 219 F. 2d 479 (1954);

F. P. Newport Corp., Ltd. v. Sampsell (C. A. 9), 216 F. 2d 344 (1954).

VIII.

Fraud is the basis of an action brought by the Government to recover the penalties and damages provided in 31 U. S. C., Section 231. Where the District Court has found that there was no fraud committed by the con-

tractor either in the bidding or in the performance of the contract, the appeal may be dismissed for failure of the record to raise an issue of law which an appellate court may consider and decide. There is no merit in this appeal. [Find. III-IX, Tr. 48-51]. Fraud was the only issue tried by the District Court [Pre-Trial Stip., Tr. 36].

Rule 52(a), F. R. C. P.;

United States ex rel. Brensilber v. Bausch & Lomb Optical Co. (C. A. 2), 131 F. 2d 545, 546 (1942), affd. 320 U. S. 711, 64 S. Ct. 187 (1943);

Fibreboard Products v. Townsend (C. A. 9), 202 F. 2d 180 (1953);

Central Steel Tube Co. v. Herzog (C. A. 8), 203 F. 2d 544, 546 (1953);

Empire District Electric Co. v. Rupert (C. A. 8), 199 F. 2d 941 (1952);

Maryland Casualty Co. v. Independent Metal Products Co. (C. A. 8), 203 F. 2d 838, 841 (1953);

Clarke Hybrid Corn Co. v. Stratton Grain Co. (C. A. 8), 214 F. 2d 7, 9 (1954).